STATE OF MICHIGAN

COURT OF APPEALS

MELZINE WICKER and FRED WICKER,

Plaintiffs-Appellants,

v

HOUSE OF LIQUOR & WINE, INC.,

Defendant-Appellee.

UNPUBLISHED
June 11, 1999

No. 206386
Wayne Circuit Court
LC No. 96-645497 NO

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Plaintiff[1] brought this negligence action on allegations that she suffered injury caused by a defective sidewalk on defendant's premises. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), holding that the condition of the sidewalk was open and obvious. Plaintiff appeals as of right, and we affirm.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a matter of law. *Miller v Farm Bureau Mutual Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996). When considering an appeal of an order granting summary disposition under MCR 2.116(C)(10), a reviewing court must examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Farm Bureau Mutual Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991); *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995).

Plaintiff contends that the trial court erred in granting summary disposition because genuine factual issues exist regarding whether the alleged defects constituted an open and obvious condition. We disagree.

In *Bertrand v Alan Ford, Inc,* 449 Mich 606, 610-611; 537 NW2d 185 (1995), our Supreme Court expounded on the open and obvious doctrine as it relates to the standard of care to which possessors of land are held with respect to invitees:

> [I]f the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide. [*Id.* at 610-611 (emphasis in original) (citations and footnote omitted).]

Plaintiff alleges that the cause of her fall was the uneven level and dilapidated condition of the sidewalk. However, "differing floor levels were not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous." *Id.* at 614 (emphasis in original). The Court announced that public policy favored encouraging a person to "look where he is going" and "take appropriate care for his own safety," *id.* at 616, then stated as follows:

> If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide. If the jury determines that the risk of harm was unreasonable, then the scope of the defendant's duty to exercise reasonable care extended to this particular risk. At any rate, the trial court may appropriately consider the specific allegations of the breach of the duty of reasonable care, such as failure to warn, negligent maintenance, or dangerous construction. If the plaintiff alleges that the defendant failed to warn of the danger, yet no reasonable juror would find that the danger was not open and obvious, then the trial court properly may preclude a failure to warn theory from reaching the jury by granting partial summary judgment. [*Id.* at 617 (citation omitted).]

Accordingly, for sidewalks of differing levels to be actionable, unusual circumstances must be present to warrant the imposition of liability. As this Court stated in *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 449 NW2d 379 (1993), "The question is: Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger?"

After reviewing the photographs of the sidewalk included in the record, we conclude that an average user with ordinary intelligence would have readily discovered the imperfections where the two concrete slabs in question meet. Although the precise extent of the unevenness may be difficult to gauge on casual observation, rather than engage in any such calculation a user of ordinary perception and prudence could simply and easily step over that minor imperfection.

Nor do the photographs suggest that there was anything unusual about the condition of the sidewalk that rendered it unreasonably dangerous despite its open and obvious nature. The two concrete slabs appear neither cracked nor uneven, except where they meet. A person walking down any sidewalk must expect to encounter irregularities of this sort. Thus, this sidewalk does not present any unusual circumstances suggesting the possibility of unreasonable dangerousness sufficient to warrant presenting the standard-of-care inquiry to the trier of fact.

Plaintiff argues that the open and obvious doctrine applies only to the duty to warn and does not to the duty to maintain, inspect, and repair. We disagree. The open and obvious doctrine concerns the duty element of a negligence action, regardless of the nature of any alleged breach. "[W]here the dangers . . . are so obvious that the invitee might reasonable be expected to discover them, an invitor owes no duty to *protect* or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992) (emphasis added). Thus, although "the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care," *Bertrand, supra* at 611, the openness and obviousness of the hazard remains relevant to an inquiry into a premises owner's liability where a party claims injury resulting from a condition on the premises. "'A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness*.'" *Id.* at 610, adding emphasis and quoting 2 Restatement Torts, 2d, § 343A(1), p 218. We note that there is no limiting language in *Bertrand* to indicate that the open and obvious doctrine only applies to the duty to warn. The appropriate inquiry remains whether the condition was open and obvious, and, if so, whether the risk of injury was unreasonable despite the obviousness of the condition.

In this case, the defect in the sidewalk presented no unusual or unreasonable risk, and thus its open and obvious nature negated any duty on defendant's part to warn or otherwise protect plaintiff with regard to it.

Finally, plaintiff argues that the open and obvious doctrine violates public policy. However, as noted above, our Supreme Court has stated that public policy favors encouraging people to look where they are going and to take reasonable care for their own safety. *Bertrand, supra* at 616. For these reasons, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Peter D. O'Connell

[1] Because plaintiff Fred Wicker's interest in this suit is derivative of that of plaintiff Melzine Wicker, for convenience in this opinion the term "plaintiff" will refer exclusively to the latter.